IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

LARRY HOLLAND,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 19-CV-663-JFH-JFJ
	)	
TURN KEY CLINICS, LLC, et al.,	)	
	)	
Defendant(s).	)	

TRANSCRIPT OF TELEPHONIC MOTION HEARING

BEFORE THE HONORABLE JODI F. JAYNE

UNITED STATES MAGISTRATE JUDGE

DECEMBER 3, 2020

REPORTED BY: ***BRIAN P. NEIL, RMR-CRR***
United States Court Reporter

A P P E A R A N C E S

John S. Bryan, Attorney at Law, Bryan & Terrill Law, 3015 East Skelly Drive, Suite 400, Tulsa, Oklahoma, 74105, attorney on behalf of the Plaintiff;

Paulina Thompson, Attorney at Law, Johnson, Hanan & Vosler, 9801 North Broadway Ext., Oklahoma City, Oklahoma, 73114, attorney on behalf of Defendant Turn Key;

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Elise M. Horne, Attorney at Law, Goolsby, Proctor, Heffner & Gibbs, 701 North Broadway Avenue, Suite 400, Oklahoma City, Oklahoma, 73102, attorney on behalf of Defendant Lance Prout.

Thursday, December 3, 2020

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DEPUTY COURT CLERK: This is Larry Holland v. Turn Key Health Clinics, LLC, et al., Case No. CV-19-663-JFH-JFJ. Counsel, please enter your appearances.

MR. BRYAN: Spencer Bryan on behalf of plaintiff.

MS. THOMPSON: Paulina Thompson for Turn Key Health Clinics, LLC, defendant.

MR. CARR: This is Mike Carr for Defendant Board of County Commissioners of Creek County, the Creek County Public Facilities Authority, Fred Clark, Joe Thompson, and Bret Bowling.

THE COURT: All right.

MS. HORNE: Elise Horne for Defendant Prout. Sorry, Judge. Elise Horne for Lance Prout.

THE COURT: Thank you. I'm sorry I cut you off. Is there anyone else?

MR. BRYAN: No, Your Honor.

THE COURT: All right. Good morning, everyone. I want to start by saying that I regret having to strike the last hearing at the last minute. I was asked to cover criminal that day and I just couldn't fit it all in so I got this reset as soon as I could.

I have reviewed all the briefs on both the motions that we're addressing here today. I'm not going to need a whole lot

of argument. I'm basically just going to launch into my rulings, and then if I have questions as to a particular request, I will ask them as I go along. I'm going to start with plaintiff's third motion to compel discovery, which is docket 88. Some of my rulings are going to be specific as to the language of those so I'd like you to have them in front of you. I'm tracking along in the plaintiff's third motion to compel, starting on page 5, with interrogatory 2.

Interrogatory 2, identity of witnesses, is going to be granted in part. I'm omitting the language "or whom you believe may have knowledge." I'm omitting the language on the next line "or any fact underlying the subject matter of this action." And I'm omitting the language in the last -- the next to last sentence "that you believe." I think those phrases are overly broad and make that too vague.

Defendant need only respond to this interrogatory with people it knows have knowledge or claim to have knowledge of the facts alleged in the complaint -- or I guess it's actually an amended petition here. If there are no corporate employees with personal knowledge of the events and only corporate employees who might testify as a 30(b)(6) witness, then those need not be included in this response.

The current reference to medical records is insufficient, and defendant is going to be ordered to list out individuals who interacted with Floyd but not in this broad

manner that plaintiff requested.

Are there any questions about that ruling as to interrogatory 2?

MS. THOMPSON: Your Honor, as to interrogatory 2, defendant had previously supplemented its response and listed all of the individuals who were involved in the care of the decedent, Floyd Holland, and that information was provided to plaintiff almost two years ago. And just to confirm, the court has ordered to only list those individuals with personal knowledge of the events at issue; is that correct?

THE COURT: That's correct. And I wasn't aware of that supplement. I apologize for that. Was that in your response brief?

MS. THOMPSON: Yes, Your Honor.

THE COURT: Okay.

MR. BRYAN: Your Honor, if I -- can I respond to that just briefly.

THE COURT: Of course you can, yep.

MR. BRYAN: That was just in a letter. I never received a verified supplemental response.

THE COURT: That's what I thought. I mean, I did see that letter that supplemented in that manner, but I am ruling that that needs to be in a supplemental verified response. But I do think that list that you provided so far is sufficient.

Anything further --

MS. THOMPSON: Your Honor?

THE COURT: Yes.

MS. THOMPSON: Yes. We have provided that supplemental response in a letter and verification of that response was subsequently provided recently to the plaintiff.

THE COURT: Okay. Mr. Bryan, what else do you need on this?

MR. BRYAN: Nothing further, Your Honor. I'm ready to proceed with the next one.

THE COURT: Okay. As I go through here, if there's something that's really adequately been resolved, feel free to stop me.

All right. Interrogatory No. 6, is there anything I need to know about how this has been supplemented or resolved before I rule?

MR. BRYAN: Nothing from the plaintiff, Your Honor.

THE COURT: Ms. Thompson?

MS. THOMPSON: Nothing, Your Honor.

THE COURT: All right.

MS. THOMPSON: Nothing, Your Honor, at this time.

THE COURT: Thank you. Okay. Interrogatory 6 is going to be granted in part. The court finds four years to be an overly broad time frame and finds two years prior to the incident to be appropriate so the request is granted for the

years 2016 and 2017. I am not going to place any geographic limits on this request. I find lawsuits in other jurisdictions could be relevant -- or are relevant to the issues of notice and *Monell* liability. I've looked at this and I think the onus of finding factually relevant cases remains on plaintiff, and I think this is a fair allocation of burden regarding identification of other relevant lawsuits in the two years preceding the incident.

Interrogatory No. 6 --

MS. THOMPSON: Your Honor?

THE COURT: Yes, Ms. Thompson.

MS. THOMPSON: If I may make a comment with regard to interrogatory No. 6?

THE COURT: You may.

MS. THOMPSON: Turn Key has locations in multiple states, not just Oklahoma, of different sizes and different needs. Is the court's decision covering the entire United States or just the state of Oklahoma? Because Turn Key's position is that the entire United States is too broad of a geographic limit and too burdensome on Turn Key to search through all those jurisdictions to find any relevant cases to provide to -- what it intends to provide to plaintiff --

THE COURT: Why is that --

MS. THOMPSON: -- that would be pertaining to Oklahoma only.

THE COURT: Tell me why that's overly burdensome and tell me why it's not relevant. Are you making a relevancy argument or burden only?

MS. THOMPSON: Well, Your Honor, I'm making both arguments. With regard to the relevancy argument, in different jurisdictions and different locations the requirement and the policies and the procedures and the requirements pursuant to the contract with the entities in those jurisdictions may be different and may not directly relate to the issue in this case.

In addition, searching through all its prior cases for a period of two years in all of those jurisdictions and all of those different states -- and Turn Key is expanding from those locations in multiple states now and it would be unduly burdensome to ask Turn Key to search through all of those records when they're publicly available to view -- most of those records should be publicly available unless were filed and then withdrawn or some sort of an incident that does not allow for a lawsuit, which would be equally difficult for Turn Key to surmise --

THE COURT: How many states? Ms. Thompson, I'm going to interrupt you. How many states?

MS. THOMPSON: I believe currently it is seven states. I would have to confirm that by checking my records. But there is Oklahoma, Arkansas, Louisiana, Texas, Kansas, I

believe Colorado. I cannot think of another state at the moment.

THE COURT: Okay. My ruling's going to stand both as to relevance and as to burden. I don't think searching through lawsuits against Turn Key in a seven-state area for a period of two years is unduly burdensome. I would also note that defendant hasn't provided any specific evidence of how long this would take or the type of burden that it would impose. Even if they did, as I said, I've thought hard about whether that's a fair allocation of work as to past lawsuits and I do think that's fair. Plaintiff's going to have to do the majority of the work of going through these to try to see if there's anything relevant. Identifying them by name, case number, and court is not overly burdensome for a two-year period and very likely to lead to relevant information.

I also don't think the fact that something happened out of state, I accept plaintiff's argument in his briefs that can still be relevant. Knowledge of an unconstitutional practice through tortious acts in other states can still create the subjective awareness of a substantial risk of serious harm. So I understand your arguments and those will be rejected.

Interrogatory No. 7 --

MS. THOMPSON: Your Honor?

THE COURT: Yes, Ms. Thompson.

MS. THOMPSON: If I -- I apologize for interrupting

you.

THE COURT: That's okay.

MS. THOMPSON: But would this ruling be limited to lawsuits filed, lawsuits only, or --

THE COURT: Yes.

MS. THOMPSON: To clarify, yes --

THE COURT: I view that as -- sorry. If you have a name -- I'm so sorry, Ms. Thompson. I talked right over you. That was my fault. But if you have a name, case number, and court, I perceive that request to be filed lawsuits only.

Mr. Bryan, is that your intent?

MR. BRYAN: Yes, Your Honor.

THE COURT: All right. Does that answer your question, Ms. Thompson?

MS. THOMPSON: Yes, Your Honor.

THE COURT: Thank you.

Okay. Interrogatory No. 7, encounters with decedent, has there been any supplement or further resolution of this interrogatory that I need to know about, Ms. Thompson?

MS. THOMPSON: No, Your Honor. This interrogatory is too vague and I believe that Turn Key has appropriately objected to this interrogatory as "encounter" is not identified specifically and we have not received any further clarification from the plaintiff as to what "encounter" means. Is that passing the plaintiff in the hall? Which would be almost

impossible to narrow down. Was it another lawsuit involving a plaintiff? Just not clear on what plaintiff is looking for there.

THE COURT: Mr. Bryan, I'm going to let you respond to that with what you're looking for with respect to the word "encounter."

MR. BRYAN: Your Honor, it would be just the content used in the phrase. If there's some type of engagement between Mr. Floyd -- or Mr. Holland and one of their agents, I would like to know that.

MS. THOMPSON: Our response to that, Your Honor, was -- our actual response to this in our interrogatory is that any encounters with respect to treatment or care of Mr. Floyd are documented in the medical records, and anything that may not be documented with regard to care and treatment would be personal knowledge of each individual treating provider and that would be able to be discovered in depositions of those individual treatment providers.

THE COURT: Okay. I find that this -- so, Ms. Thompson, have you provided -- you provided reference to the medical records under Rule 33(d); is that right?

MS. THOMPSON: Yes, correct. And further clarify that anything that the individual providers may remember in addition to what's documented in the medical records from their personal recollections with interaction with Mr. Holland,

plaintiff is welcome to discover that additional information by deposing those providers directly which plaintiff has not performed.

THE COURT: Okay. Interrogatory 7 will be denied. I agree with Ms. Thompson that the court -- the defendants' reference to medical records under Rule 33(d) is sufficient for purposes of identification and description of any encounters as to treatment and care, which are the encounters that I find relevant in this case. I think plaintiff's request would require Turn Key to essentially nail down the testimony of every medical provider regarding the encounter and try to put that in writing in an interrogatory and I find that overly burdensome for purposes of written discovery.

I will say that, Ms. Thompson, if you're aware of other encounters as to treatment and care that are not in the medical records provided, you must respond in narrative form for those.

MS. THOMPSON: Yes, Your Honor. If Turn Key becomes aware of anything else responsive in that regard, we will supplement.

THE COURT: Okay. And I do expect there to be some inquiry of employees on duty during the relevant time frames with respect to that. But other than that, everything that you've done so far with respect to identifying the medical records is adequate. This relates to, I think, request for admission 7 as well so we'll come back to that at that time.

Any questions on the ruling on interrogatory 7, Mr. Bryan?

MR. BRYAN: Nothing from the plaintiff, Your Honor.

THE COURT: All right. Ms. Thompson?

MS. THOMPSON: Nothing further from defendant.

THE COURT: Okay. Moving on to request for production 2, this request will be granted but only to the extent that defendant knows what documents it's going to use at this point. This need not be a comprehensive exhibit list. Any documents known to Turn Key for use in the litigation must be produced as they would under other initial disclosure requirements. Defendant need not attempt to marshal all documents and evidence yet, but it must produce documents that it knows will be relied on at trial at this time.

Request for production 3, investigations, that's going to be granted in part. I find certain language again to be overbroad. I'm going to omit language "relate or touch upon" and I'm going to omit language "in any way connected" in the next line. So this request is going to read: "All documents which refer to any investigation of the claims or defenses asserted in the pleadings."

I'm overruling any state law peer-review privilege for the same reasons articulated in the *Cox v. Glanz* case. If defendant wants to produce a privilege log in response to this, I will give defendant the opportunity to do that. But

otherwise, this is going to be granted with the limitations that I placed on the language.

MS. THOMPSON: Yes, Your Honor. The defendant has previously responded that no responsive documents are available.

THE COURT: Can you repeat that, please? I'm sorry.

MS. THOMPSON: The defendant, Turn Key, has previously responded to plaintiffs that we have performed a diligent search of our records and no responsive documentation is available.

THE COURT: Okay. Well, that will be granted and you have a duty to supplement, if you find any.

MS. THOMPSON: Yes, Your Honor.

THE COURT: Request No. 4, ESI, the incident and affirmative defenses, again, that's going to be granted in part. It's going to be limited -- this is just a way the court limits some of this overbroad language -- but I'm just going to start that phrase with the capital "Statements." I'm going to eliminate the "all documents including but not limited to" language. I think the appropriate starting place is statements affidavits, e-mails, text messages, and recordings, et cetera, involving the claims or defenses asserted in the pleadings in this case. I'm going to limit the time frame to this to two years prior to the incident.

I find a search of the ESI to be reasonable based

particularly on the e-mail that's been presented by plaintiff. Plaintiff has provided an example of an e-mail referencing the cost of inhalers that was one month prior to Floyd's admission to the jail.

The parties are directed to confer regarding custodians and search terms. And, again, this is for only a limited two-year time period prior to the incident, the ESI, or other recordings or any other statements whether they're written or memos. That's a two-year time frame that they have to be searched.

I think there was some dispute in the briefing about whether this extended to staffing and supervision and training documents. I do not find those to be logically included in this request. This particular request goes to statements and communications and will be limited to that. If plaintiff wants staffing and supervision and training documents, plaintiff needs to ask for those by category and certainly knows how to do that.

Any questions on request for production 4?

MS. THOMPSON: No, Your Honor.

MR. BRYAN: Nothing from plaintiff.

THE COURT: All right. Request for production 8; this is selected employee records. That request is going to be granted. I don't think it's vague or ambiguous or overly broad. Plaintiff does not have to request this by specific

employee. Defendant must identify relevant employees from the medical records and produce those employment records.

My understanding is there are only 19 pages of medical records and Floyd was only -- I'm sorry -- Mr. Holland was only there for three months so I don't think this is a vague or overly burdensome request.

MS. THOMPSON: Your Honor --

THE COURT: Yes.

MS. THOMPSON: -- just to clarify, that defendant has supplemented with the names of our employees almost two years ago and has recently produced the employee files for those employees to plaintiff.

THE COURT: Okay. Good. Then you've already complied with my ruling.

Is there anything else that needs to be resolved on that, Mr. Bryan?

MR. BRYAN: No, Your Honor, other than I have not yet confirmed that the documents that they have produced would be consistent with the order. So with that caveat, they have supplemented but I have not verified it is a complete supplementation.

THE COURT: All right. Request for production 9, policies. I want to make sure I understand what Turn Key has produced. I think I did see a table of contents that may have been in a supplemental production, Ms. Thompson; is that

correct?

MS. THOMPSON: That is correct. And we have produced a table of contents to allow plaintiff's counsel an opportunity to select relevant policies and procedures that they had requested to produce in their entirety. We do not believe that all of the policies and procedures are relevant to the facts of this case and find that many of them are not relevant and are beyond the scope of discovery. Plaintiff's counsel has not made arrangements or contacted with that request so far.

THE COURT: You mean plaintiff hasn't identified any of the categories listed in the table of contents and told you what he wants?

MS. THOMPSON: Yes.

THE COURT: Okay. Mr. Bryan, tell me why this table of contents isn't sufficient at this point.

MR. BRYAN: What I typically find with a table of contents is while it may be a starting point, what happens is these policies when you get them will start cross-referencing other portions of the policy manual that have not been produced, and then it just becomes a never-ending process of requesting this policy that cross-references this policy and you just have no idea how the entire policy manual operates until you have the whole policy manual. And it's just -- it is a more efficient method of production to look at the policy

manual because that's what's governing the facility as a whole, as opposed to doing it in piecemeal fashion and then wondering what other elements of this policy manual are having an impact on these policies that I'm just not aware of.

MS. THOMPSON: Your Honor, I find plaintiff's argument inconsistent with reality. There's no constant cross-referencing with one policy to the other; they're independent from each other. Based on the subject that they addressed, each policy is clear in the title in the table of contents. Such as, for example, the care of pregnant inmates, that is clearly not relevant to this case and I don't see why Mr. Bryan would be requesting that policy, for example. There's no other manuals. The table of contents clearly provides each and every policy that is contained in the manual. There's no other additional manual that is cross-referenced.

In addition -- and I've done this with counsel in other cases and I have offered this up to Mr. Bryan before -- somebody from a plaintiff's firm is welcome to meet with counsel for Turn Key, such as myself, and review those policies in person and feel like those that they need are relevant so that way there's no need to go back and review anything again. That could be done in one day and then we would produce the relevant policies to them at that time.

THE COURT: Okay.

MS. THOMPSON: We would object to producing the

entire policy manual because in large part it is not relevant to the facts of this case.

THE COURT: Ms. Thompson, has Turn Key produced the entire table of contents or selected portions that Turn Key believes are relevant to this case?

MS. THOMPSON: Turn Key has produced the entire table of contents.

THE COURT: All right. This request for production, the motion to compel is going to be denied. Turn Key has produced a table of contents -- an entire table of contents and I find that to be sufficient at this time.

Mr. Bryan, you can go through that, ask for the relevant sections. If you get the relevant sections and they cross-reference a section you don't have, I'm going to let you go to Ms. Thompson at that point, and my guess is she's going to be pretty reasonable about that given that she's given you the entire table of contents.

My only concern in these cases is when a defendant is having the opportunity to pick and choose the sections of the policy that they give you the provisions for which I've seen. If they're giving you the entire table of contents, I think that's sufficient at this point. I think the objection is well-founded that they shouldn't have to produce every irrelevant section of this policy when there are going to be very specific policies that are relevant to this case and most

of them will likely not be relevant at all.

So the objection that I'm sustaining is the facially overbroad objection.

MR. BRYAN: Your Honor, can I make a comment briefly?

THE COURT: You may.

MR. BRYAN: This is -- while Turn Key has tried to cabin this in the context of simply the policy and procedure manual, the request is not specifically limited to the policy and procedure manual. Turn Key has gotten written guidance that is separate and distinct from the policy manual, which includes nursing protocols, which would be highly relevant to how they handle Floyd Holland; in fact, probably more relevant even than the policy and procedure manual. I don't have anything with respect to nursing protocol or any other written guidance that would be applicable to how they handle chronic-care inmates, asthmatics, people that are inhaler-dependent, anything like that.

And so limiting this to simply the policy and procedure manual I think is -- it would be underinclusive of the guidance that is actually applicable at the facility. And so I would ask that to the extent that Turn Key has other written guidance that exists that would be relevant to these types of issues, that they do produce a table of contents to the nursing protocols or provide what other written guidance that they may

have that would be specific to these claims.

THE COURT: That's a fair argument, Mr. Bryan. I may have let defendant lead me down a path of couching this totally in terms of the policy because that's kind of how this was briefed.

Ms. Thompson, do you have -- have you searched for other written memos or guidelines which are certainly requested in RFP 9, such as nursing protocols, that would be relevant to this case?

MS. THOMPSON: Yes, Your Honor. With regard to the nursing protocols, the nursing protocol that Mr. Bryan is referring to are not policies or procedures relating to conduct of Turn Key or any specific location. Nursing protocols in that are guidelines for medical treatment of a particular condition that's provided by a medical director. It is not the same thing as an operative guideline or any policy of conduct so it is not in the same category as request No. 9.

There are no other operative policies or procedures in Turn Key except a manual, the table of contents for which has been provided to plaintiff. Plaintiff has not requested nursing protocols specifically or anywhere in the plaintiff's requests for production. Because it is Turn Key's position that this nursing protocol did not fall in the category of policies and procedures. Nursing protocols are specific treatments for certain conditions such as diarrhea, for

example, that the treatment steps can be taken by a lower practice nurse, such as an LPN or an RN, without having to consult with a doctor or a physician.

So, for example, if diarrhea is observed in an inmate, then those steps that are set out in those protocols can be followed and treatment administered indicated in that protocol without having to consult with a treating provider, such as an LPN or M.D. and those steps do not work, then follow-up with a high-level provider, such as an LPN or M.D., would be made.

So that has to do with the treatment and care of the patient, not the operative policies of Turn Key, which in Turn Key's position is a different type of request which was not made by Mr. Bryan --

THE COURT: Okay, Ms. Thompson. Let me stop you. That's enough on that.

These nursing protocols, are they drafted by Turn Key medical -- the Turn Key medical director meaning they're specific to Turn Key?

MS. THOMPSON: Yes. They're drafted by the treating provider --

THE COURT: Okay.

MS. THOMPSON: -- and --

THE COURT: All right. Let me ask you something else.

MS. THOMPSON: -- there are different ones in

different locations, yes.

THE COURT: If, from your perspective, plaintiff had asked for this correctly -- I understand your argument that this falls outside RFP 9 -- if they had asked for it correctly, are you making a relevance argument that somehow these nursing protocols aren't relevant? Or would it be a similar argument that you should be able to produce some sort of index or list of those?

MS. THOMPSON: If the plaintiff directly asked for the nursing protocols, I would provide -- I would provide a table of contents. Because some of those, of course, would not be relevant for the care and treatment provided to Mr. Floyd or his alleged condition.

THE COURT: Okay. Mr. Bryan, I'm assuming your argument is guidelines, however characterized, encompasses the nurses protocols; is that correct?

MR. BRYAN: Yes, Your Honor. And I would just add that it's fairly well-established in the Tenth Circuit that any type of written guidance that is utilized in the care and treatment of a particular individual is certainly sufficient to establish some type of subjective knowledge, or deviations from those policies would be able to establish a reasoned inference of deliberate difference.

THE COURT: Okay. I find that -- I think I previously said RFP 9 was going to be denied because I found

what had been currently provided sufficient. I'm going to revise that ruling and say it's granted in part and denied in part. It's denied in part, as I previously indicated. With respect to unproduced nursing protocols that are written, I find those are encompassed within request for production 9's request for guidelines, however characterized, governing operations from August 2017 through November 2017.

I'm going to require production of a table of contents of those nursing protocols, I find them relevant, and I'm allowing an initial production of a table of contents for the same reasons that I previously articulated with respect to the policies.

Even if I went back and made plaintiff revise this request, somehow I would still reach the same result and we would just be doing the same thing back here again. So I do find it's encompassed and I find this to be the most efficient way to get those nursing protocols produced in this case.

Moving on to request for production 10, which is income statements and budgets for 2015 through 2018, I want to hear from you, Ms. Thompson, quickly about -- I think you cited a holding in the *Sanders* case by Judge McCarthy in relation to Rule 30(b)(6) testimony. Do you believe Judge McCarthy ruled against another plaintiff on this issue?

MS. THOMPSON: I'm sorry. I did not understand the last portion of your question.

THE COURT: Did -- let me rephrase it.

I was trying to find -- in the *Sanders* case, I believe you said Judge McCarthy reached a contrary ruling as to plaintiff's position. In this case, obviously it's a different case with a different lawyer. But I want to hear from you, first of all, as to why that's not relevant; and second of all, what you know about Judge McCarthy's ruling in the other case.

MS. THOMPSON: Yes, Your Honor. In the other case, there were two topics that encompassed financial information, such as profits, budget, and financial condition I believe was the exact request in that case. And Judge McCarthy found that this is relevant to the claims alleged in that case, which is the same claims delivered in different in the position (inaudible) same claims that more or less in this case. That was not a motion to dismiss because it was dismissed at the state level.

But regarding the 1983 identical claim, Judge McCarthy found that information to be irrelevant and having no provident value as to the filing of deliberate indifference of Turn Key and its employees and denied those topics from consideration.

In my argument in response to plaintiff's motion to compel, I found that only to be relevant as to the similar issue in this case. Because plaintiff is seeking broadly financial information which is confidential, private, and proprietary information of a private corporation which is --

the private corporation, such as Turn Key, has a certain right to privacy which is not being infringed in a nonviolent fashion.

I do not believe that Mr. Bryan had articulated a sufficient justification for infringing as to those rights to privacy by blocking the request of financial information when it has no probative value to the actual deliberate indifference. There's no allegation that the financial position or financial decision of Turn Key somehow affected the care of Mr. Holland --

THE COURT: Isn't it relevant -- Ms. Thompson, isn't it relevant to punitive damages?

MS. THOMPSON: Well, it could be relevant to punitive damages, Your Honor. However, the punitive damages stage has not been reached in this case and it may never be reached. At this point their motion to dismiss -- several motions to dismiss are still pending in this case and could still be granted.

Further, Turn Key denies the allegation of the plaintiff --

THE COURT: Sure.

MS. THOMPSON: -- and they may not be established and we may not ever reach the punitive stage.

THE COURT: I understand that argument. Ms. Thompson, I'm going to stop you. We just don't know -- I

mean, I haven't ever seen a court take a break for discovery and let some more discovery be done on punitives. That usually proceeds in a rapid fashion so I'm wondering how plaintiff would get this information.

Mr. Bryan, I'm going to let you respond to the arguments both as to relevance as to liability or deliberate indifference and punitives.

MR. BRYAN: Thank you, Judge. I think it's fairly straightforward in why the relevance to punitive damages. They are -- the information is specifically relevant to the degree of, you know, the probability of the misconduct. It is the traditional punitive damages type of information.

THE COURT: And if I were to give it to you now, how would you get it, Mr. Bryan?

MR. BRYAN: I -- that's a great question, Your Honor. I don't know at what point we would take a break as part of the litigation and try to re-engage discovery with respect to punitive damages. I just don't know.

THE COURT: Well, you know and I know that just doesn't happen. I mean, I've never seen that happen. But go ahead.

MR. BRYAN: Yeah. And with respect to the substantive issues, I would refer the court to the *Swan* case and the holding in *Swan* matter that we cited in the reply brief and how the *Swan* court addressed how financial information is

substantively relevant to allegations where there is specific evidence that would at least support an inference that there was decision-making that was tailored to financial considerations as opposed to medical need.

And in this case, we've provided the court with evidence that there was considerations relevant to denying inhalers because of the financial costs associated with that. In addition, we've also provided evidence to the court where this particular practice that we're alleging manifested itself in another jurisdiction that resulted in the death of an inmate prior to the time of Mr. Holland's incarceration.

So I think based on the rationale of the *Swan* case, in addition to just the judicial efficiency and for the parties with respect to discovery and punitive damages, I think the information's relevant. I would add just also there's some allegations related to staffing that would implicate the financial records that we're seeking.

THE COURT: If I gave you one year of this, Mr. Bryan, what would be the most important year, 2017?

MR. BRYAN: I would probably -- because the incident in Arkansas happened, I believe, at the end of 2016, I think 2016 and 2017 would be the most important. But if we're only doing one year, I would probably request at least the one year prior.

THE COURT: All right. Respectfully I think there's

some factual issues in this case that may not have been present in *Sanders* regarding whether financial considerations played a role in some of the medical issues that are at issue here. Again, plaintiff has submitted some evidence -- I know it's just an e-mail -- but plaintiff has submitted some evidence that there's discussion of how much certain things cost and those certain things could have been things that made a difference in the level of medical care that was provided in this case. So the finances are at issue to at least some small extent and perhaps more than in the *Sanders* case.

I also find that some of this information has to be presented as relevant to punitive damages. There could be later stages of the case or of discovery that this could be appropriate in, but I don't think you would get through the end of discovery and then wait to see whether you got a punitive damages instruction and then try to get this discovery. That seems like an awfully big risk for plaintiff to take and I find it relevant to the proceedings.

I do think that the years requested are overly broad and I don't know -- yeah, I think income statements and budget is appropriate. I'm going to allow that for the years of 2016 and 2017 and it's going to be subject to the protective order.

Obviously, if there's specific things -- I can't imagine what it would be, Ms. Thompson, but if there are any specific things that you think are not relevant that need

redacted, I would certainly consider that redaction for privacy sake, but I think most of it's probably going to be relevant under my ruling. So I'm going to require production of that information for 2016 and 2017 subject to, of course, a protective order.

Are there any questions about that ruling?

MR. BRYAN: Nothing from the plaintiff.

MS. THOMPSON: Nothing from defendant.

THE COURT: Thank you. All right. Let's talk about the request for admissions. No. 7 was not mentioned in your reply brief. Is that still at issue?

MR. BRYAN: Yes, Your Honor.

THE COURT: It is. Okay. Why are you contending this is vague or hard to admit or deny, Ms. Thompson? You, being Turn Key, did not provide any medical care or assessment of plaintiff's decedent that is not documented in the medical records from the Creek County Detention Center.

MS. THOMPSON: It's vague whether they're referring to the medical -- medical records from the Creek County Detention Center. Creek County Detention Center keeps medical records from prior incarcerations of inmates and other inmates that are no longer incarcerated so it is vague as to what specific medical records that they're referring to. We have no access to the Creek County Detention Center records --

THE COURT: Oh, okay.

MS. THOMPSON: -- of the Turn Key records.

THE COURT: All right. Mr. Bryan, can you -- what are you asking them for here to admit or deny? Do you understand what she's saying?

MR. BRYAN: Yeah. And, I mean, all we're looking for is to get some type of clarity on what the scope of the encounters are, that there are encounters that are outside the records. You know, they're suggesting in their prior answer to the interrogatory there is not so I'm not sure --

THE COURT: All right. This request for admission is going to be denied. I agree with Ms. Thompson and with Turn Key that that last phrase "from the Creek County Detention Center" makes this vague. On a request for admission, the wording is extremely important and I'm not going to make them answer that. I do think you have a lot more assurance than you had before you started here today about the individuals involved in the encounter, but the way that's worded I'm going to deny it.

Request for admission 8, you did not discipline or reprimand any employee arising from any encounter with Floyd Holland, how is that ambiguous? The word "encounter," is that your argument, Ms. Thompson, again?

MS. THOMPSON: I mean, yes, the word "encounter" is vague so it is difficult to deny or admit this without knowing what specifically that means.

THE COURT: Okay. I don't think that's vague or difficult to understand. I also think that whether the encounter was related to medical care or treatment or not, I think that's still relevant and I think you can easily admit or deny that based on the way it's worded. So the motion to compel, request for admission 8, is going to be granted. The word "encounter" is given its normal meaning.

Okay. I think that covers plaintiff's third motion to compel. Anything else we need to address on docket 88 from the plaintiff's perspective?

MR. BRYAN: Nothing, Your Honor.

THE COURT: Ms. Thompson?

MS. THOMPSON: Nothing further from defendant.

THE COURT: Okay. Now we're going to move to plaintiff's second motion to compel which is docket 85. This requests all documents produced by Turn Key in the *Sanders* case, which is a case pending in this district, for medical negligence resulting in death that was less than one year prior to Mr. Holland's death.

Mr. Bryan, I want to hear from you. I don't have a great sense from the briefs of exactly -- I don't need a long explanation but briefly the facts of each of those cases. And I know you don't represent the plaintiff in that case, but I need to know what medically is at issue other than, of course, deficient care and treatment but I need to know some more about

the facts in the *Sanders* case. And I also want to hear from you on exactly when each death occurred and whether they were both at the jail when the death occurred.

Mr. Bryan, I'm going to start with you.

MR. BRYAN: Sure.

THE COURT: So I'm trying to establish whether there's -- to sustain or deny the relevance objection here.

MR. BRYAN: Sure. So Brenda Sanders, as the court already acknowledged, happened roughly one year prior to Mr. Holland's incident. Ms. Sanders, like Mr. Holland, was a chronic-care inmate at the facility. Mr. Holland's medical condition involved COPD. Mrs. Brenda Sanders, she -- my understanding is had some type of infection and ended up going septic. Both of them were housed towards the latter part of their detention within the holding cells, I believe, the segregation holding cells, in the booking area at the facility. Turn Key was the operator in both instances. The allegations in both cases involve the denial of care.

Mrs. Sanders, I don't know if she died at the facility or died shortly thereafter at a hospital. Mr. Holland died roughly 15 days later at a hospital, but I believe he was on life-support measures almost from the moment that he left the facility and never regained consciousness.

I believe the Oklahoma Medical Examiner's Office has identified both deaths happened due to the policies occurring

at the jail, and both of them were chronic-care inmates and would be subject to the same types of policies and procedures and same type of operational protocols between the 2016 death and the 2017 death.

So because both of them were subjected to basically the same policies in the same location, they were both classified as chronic-care inmates, and they both ended up dying because of what both estates are alleging was inadequate care, we believe it's at least -- our estate should be allowed to at least make the argument that the Sanders death is a sufficiently similar incident for purposes of establishing the county's course of conduct in the *Monell* context.

THE COURT: Okay. I want to talk to you about my concerns about this request in this case and let you address those concerns.

These are two ongoing -- as you know, these are both ongoing cases. I believe Judge Little recently had a hearing. I'm obviously conducting hearings. There's going to be different relevance rulings particularly as to other incident evidence, I would think. I might give you four years. She might give you two years. I don't know. I haven't looked.

There appears to be some element that's causing me concern about granting you all discovery in another proceeding that's not concluded, that's not an identified universe of documents, and that I don't know what has or hasn't been

permitted as relevant particularly in relation to my rulings. I'm not saying that there's not a whole swath of documents that aren't relevant. I do think there are a lot of relevant documents that have been produced in that case. I'm not sure if you're asking for them in a way that's appropriate given that these are both ongoing cases.

What is your response to those concerns?

MR. BRYAN: Well, the way that the case is being litigated obviously, you know, is going to be different because there are factual differences amongst the two cases. That's simply the same concern that's going to exist with every case that's out there. Any similar case is going to be dissimilar in some ways and similar in other ways.

But because that information at least has a prima facie determination of relevance in the sense that Turn Key has decided it was at least relevant enough to produce it voluntarily in response to a request, or the court has similarly found it relevant for purposes of production, for us to be able to make a cogent argument about similarity we have to be able to understand both the facts that are similar and the facts that are dissimilar.

I think because there is at least an indication that the documents that have been exchanged -- which is, you know, obviously only the documents and have been exchanged, there's at least an indication, either from the court or from Turn Key,

that these documents are relevant to what was going on with Brenda Sanders.

I do appreciate the idea that there is kind of ongoing litigation and so the scope of what may be relevant -- or responsive, I think, to this particular request could change in the future. I think to mitigate that concern we would be willing to put a time limit on it as of, you know, a particular date and say that documents produced up until this point, you know, that have already been exchanged would be subject to this particular request.

Then in the future, if there were other documents that became available that may be relevant to this particular case, then that could be something that could be revisited down the road. So at least in terms of addressing the shifting landscape of what is actually being ordered produced, that's, I think, at least one method of trying to get our way --

THE COURT: Sure. What about my concern about, you know, you're getting -- a plaintiff in that sense is getting the best of all words if I give you a bad ruling on other incidents that you don't like, maybe you get a better one in the other case or you get an extra year or, you know, you get a few extra lawsuits? You're just saying that's a casualty of this is the most efficient way to go about requesting this information from this particular defendant; is that right?

MR. BRYAN: That is -- yeah, I think that is one way

to look at it. Maybe another way to parse that is to say, well, you know, to the extent that, you know, this court has placed limitations as to time that may be different than in the other case, that whatever limitation this court is applying would be applied to whatever has been produced previously.

So, for example, if Judge Little had ordered the production of four years but this court believes only two years would be relevant based on these facts, that this court's interpretation of what's relevant would control as opposed to whatever Judge Little has ordered in that case.

THE COURT: Yeah. That's not workable, Mr. Bryan. I mean, that's asking a whole lot of the defendant to -- for purposes of a document response. So the second plan, I don't think, is tenable.

I want to hear from -- yeah, go ahead.

MR. BRYAN: Oh, I had just one other option.

THE COURT: Sure.

MR. BRYAN: The document that Turn Key has produced to the plaintiff in the *Sanders* case without, you know, an order for production that Turn Key had acknowledged, yet we all agree that these are relevant documents for purposes of the allegation, that would be, I guess, another way to kind of address this.

THE COURT: Okay. Understood. And I realize these are issues that weren't precisely raised as objections. These

are kind of more my logistic concerns about ordering this type of piggy-back discovery or clone discovery, I think is what the case law calls it.

I'm going to turn to you now, Ms. Thompson, because I know you are the attorney in that case that represents Turn Key. I want to hear from you is there any major category of documents that have been produced that you think are wholly irrelevant here?

MS. THOMPSON: Yes, Your Honor. Specifically, for example, confidential employee files that have been produced in that case would be completely irrelevant. None of the employees that are Turn Key care providers that were involved in the care of Ms. Sanders were involved in the care of Mr. Holland. So that would be confidential --

THE COURT: Sure.

MS. THOMPSON: -- information that has no relevance and would be legally intrusive for plaintiff in this case to obtain that information.

In addition, the concern in this case is that neither the plaintiff's counsel nor the plaintiff in this case are subject to the protective ruling in the *Sanders* case. So anything that is produced that has been produced in that case to the plaintiff in this case Turn Key cannot be guaranteed confidentiality of that information. That is a serious concern of Turn Key.

In addition, there's confidential patient information that has been produced in that case and there's been no medical authorizations that have been provided to plaintiff's counsel or plaintiff in this case that would entitle them to the production of that information.

I can understand where given the fact that these incidents occurred in the same jail with the same medical-care provider, there could be some overlap in relevant documents such as maybe policies and procedures or something like that. But the way plaintiff's counsel is seeking the entire file is just impermissibly overbroad and a recipe for violation of privacy and the violation of the protective order, and Turn Key would be at risk to produce information that has absolutely no relevancy to the current litigation, is outside the scope, and way beyond the needs of this case.

Plaintiff should be required to produce -- or to request specific documents that plaintiff feels are relevant to this litigation that may have been produced in the *Sanders* case. I think for the entire file is just extremely overbroad and calls for information that is confidential and has no relevance.

In addition, I would like to comment that the facts of these two cases are not the same. It involved different issues, sure. The basic allegation of 1983 violations in both lawsuits is the same; however, the underlying facts are not the

same.

In this case, Mr. Holland had passed away two weeks after being transported to the hospital, and the allegation is that Turn Key had failed to provide him with specific medications, inhalers, which Turn Key denies, of course.

But in the *Sanders* case, it was a female that had an underlying issue of cirrhosis of the liver which was not -- that information was not provided to Turn Key providers by the inmate and Turn Key providers were not aware of that information, which later on this inmate had collapsed and was transported to the hospital in a critical condition where she had died from sepsis. There's an allegation that the inmate may have suffered from diarrhea which Turn Key was not aware of.

So it's not the same information, not the same facts that underlie this case and the *Sanders* case. Just the basic allegation of a 1983 violation is not enough to draw a correlation or any kind of relation between the two cases to show that, yes, this is the same and Turn Key is doing this again for the purposes of *Monell*.

In addition, which is important, and I agree with the court's concern, that both of these cases are still in the process of litigation and these violations have not been established. So for the purposes of *Monell*, he's not established a pattern of conduct of prior wrongdoing when prior

wrongdoing has not yet been established. In addition, as I stated in my response to plaintiff's motion to compel, one incident is not enough to establish a pattern.

The plaintiff is free to search public records for other cases against Turn Key that may establish that pattern that have already been ruled on by other judges or whatever the case may be. But if the plaintiff is going to start asking for the entire file like in discovery in every case that Turn Key has ever litigated, where is this going to end? This is a different slope of dangerous proportion.

So these are the concerns that Turn Key has in the case. If plaintiff believes that there are specific types of documents that are relevant to the litigation in this case, then plaintiff should identify those specific documents and allow defendant to respond to the production of those specific types of documents. Asking for an entire file is inappropriate.

THE COURT: All right. Mr. Bryan, are there specific categories you could identify? I'm really struggling with this being overbroad and kind of the logistics of this. But are they specific categories you can identify within this request if you were to revise this?

MR. BRYAN: Yes.

THE COURT: You understand her concern. There's going to be employee files -- and I know discovery requests

don't have to be perfect. I understand that. But if we're getting into entire, you know, swaths of documents and information that's just not relevant and that's confidential, such as employee information, that is likely making your request overbroad. So could you limit this to categories?

MR. BRYAN: We could. I would also say, though, that the staffing -- one of the allegations in this case specifically relates to staffing and specifically relates to training. And irrespective of whether the Sanders estate ever even filed a lawsuit, these documents, we would contend, would be relevant to the claims here because one of the ways of establishing *Monell* liability is to show if anything was happening across different individuals.

So, I mean, merely because there was different Turn Key employees treating or handling Mr. Holland's case than handling Ms. Sanders' case, that's actually a distinction that, I think, tips in favor of establishing *Monell* liability. If we can show that these same problems were occurring not just with the Holland employees, but also with the Sanders employees as well, that's certainly an indication that there is some *Monell* considerations that are underlying what is happening to these individuals.

THE COURT: And you're saying that would be reflected in their employee files?

MR. BRYAN: Yes, Your Honor. That would -- those

employee files would identify the various training these individuals had or didn't have and who was training them, the policies or the protocols that were informing their decision-making when they were coming to the facility.

I mean, one of the allegations in this case relates to the contract between Turn Key and the county and that the contract called for a specific number of nursing hours per week that Turn Key was then not providing. And the consequence of that is not merely, you know, Turn Key saving money on personnel costs, but it has an impact operationally. Because when you have a short-staffed facility, the nursing staff is overburdened with duties, and the only thing that they can get to are the daily routines such as performing sick-call requests and pill-pass during their shifts. And so the chronic-care inmates like Mr. Holland and like Ms. Sanders are simply left to languish inside of these cells because the staffing pattern prevents them -- prevents the nursing staff from actually performing the duties that they needed to perform with respect to chronic-care inmates.

And so, yeah, there are going to be, you know, different records and different considerations with respect to locations, but as I mentioned, it doesn't matter whether the Sanders estate ever filed a lawsuit at all. The records that relate to her detention, which I believe was only about 30 or 45 days' long, are going to be relevant to the arguments that

we intend to make to the court about *Monell* liability and how these two individuals were treated similarly and how their outcomes were similar.

What Turn Key is suggesting is that we don't even get to make that argument, that we're not even allowed to -- you know, because this is one incident, we don't, you know, even get the opportunity to argue that one incident and we identified another incident in Arkansas.

So while I appreciate some of those concerns about, you know, the personnel records, you know, those individuals' personnel records are going to be kept under a protective order in this case, just as it is in *Sanders*, and they don't have any expectation of privacy that's any different or any greater than it would be in the *Sanders* case than it would be in the Holland case.

The issue is trying to identify similarities in how these -- how this staff operated at this facility and what was -- you know, what was guiding their decision-making --

THE COURT: Okay. I appreciate your arguments, Mr. Bryan. I think I've heard enough from both of you on this issue. Again, I appreciate your briefing. It was helpful and good.

I'm going to take this motion under advisement. I will either do a short written order or set up another phone hearing to give you a ruling on this second motion to compel. I want

to look at some law. Neither one of you really cited any cases specific to this what I call piggy-back or clone discovery, and I want to see if I can find anything in the Tenth Circuit that tells the court the standard to apply or how to go about that analysis.

I will tell you that I do think a whole lot of these documents that you're asking for are going to be relevant. Whether you get them in this request or whether you have to draft another request that's more specific, I do think they're relevant. I don't think the fact that it's only one incident is going to prevent plaintiff from getting this information and getting some of these documents. Obviously, one might lead to two, one might be three, and this is just one piece of the puzzle. In proving *Monell* liability, he doesn't have to show ten of them to get this particular case.

But I do want to look at some of the logistics that come into play with this -- with this type of a discovery request, I want to make sure I understand the facts of *Sanders*, and I want to look at some of the rulings in that case a little more closely.

The issue to me is just really whether this is the right way to go about getting this information. I know I did already deny -- or grant -- I'm sorry -- a motion to quash because we decided the third party was not the correct way to go about it and so plaintiff did it this way. Now I'm deciding

whether this request is overbroad essentially. So with that, again, expect either a short written order or another phone conference to give you an oral ruling on that issue.

Is there anything further from the plaintiff?

MR. BRYAN: Nothing from the plaintiff, Your Honor.

THE COURT: Anything further --

MS. HORNE: Nothing further from defendant.

THE COURT: -- Ms. Thompson?

MS. THOMPSON: I was just going to say nothing further from defendant either, Judge.

THE COURT: Okay. Thank you. Thank you all for your arguments today. They've been very helpful. Have a great day.

MR. BRYAN: Thank you, Judge.

(The proceedings were concluded)

C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Northern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 28th day of December 2020.

s/ Brian P. Neil

Brian P. Neil, RMR-CRR
United States Court Reporter